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81-746

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1981
No. _____

CITY OF AKRON,
Petitioner,

-vs-

AKRON CENTER FOR REPRODUCTIVE HEALTH, INC., et al.,
Respondents

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

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QUESTIONS PRESENTED

1. Whether the state's interest in maternal health and wellbeing is such that it may regulate abortion in a reasonable manner which is not unduly burdensome, even during the first trimester of pregnancy.

2. Whether a child under the age of fifteen years can be required to obtain the consent of one parent or her legal guardian or a court order authorizing the minor to consent to an abortion.

3. Whether the state can require the physician personally to inform the woman of facts relating to her pregnancy, the abortion procedure, fetal development, and agencies available to assist her.

4. Whether the state can require the physician personally to counsel the patient with respect to the risks and technique of the abortion prior to performing the abortion.

5. Whether the state can require a waiting period of twenty-four hours between the signing of an informed-consent form and the performance of an abortion.

6. Whether the term "humane" as it relates to the disposal of fetuses in Section 1870.16 is void for vagueness, and if so, whether the term is severable from the balance of the section in accordance with City Council's express intent that the provision be severable.

PARTIES

Petitioner, the City of Akron, was Defendant below along with John Ballard, Mayor; Dr. C. William Keck, Director of Public Health; and Peter Oldham, Prosecutor. Co-Defendants in the trial court were Dr. Francois Seguin and Mrs. Kathleen Black who were permitted to intervene "in their individual capacity as parents of unmarried daughters of child-bearing age" and who were permitted to appear as amici curiae on all issues in the case. The Respondents in this litigation are Akron Center for Reproductive Health, Inc.; Akron Women's Clinic, Inc.; Womencare, Inc.; and Dr. Bliss, a physician who had worked in one of the abortion clinics and who claimed to represent the rights of clinic patients who desired abortions.

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OPINIONS BELOW

The opinion of the Court of Appeals for the Sixth Circuit, rendered on June 12, 1981, has been reported as Akron Center for Reproductive Health, Inc. v. City of Akron, 651 F. 2d 1198 (1981). The opinion of the United States District Court for the Northern District of Ohio, Eastern Division, rendered on August 22, 1979, has been reported as Akron Center for Reproductive Health, Inc. v. City of Akron, 479 F. Supp. 1172 (N.D. Ohio 1979).

JURISDICTION

The judgment of the Court of Appeals for the Sixth Circuit was entered on June 12, 1981. A petition for rehearing was filed with the Court of Appeals by the Petitioners, the Respondents, and the Defendant-Intervenors. The Court of Appeals denied all parties' petitions for rehearing. The Defendant-Intervenors' petition for rehearing was denied on July 22, 1981. This petition for certiorari was filed within ninety (90) days of that date. This Court's jurisdiction is invoked under 28 U.S.C. Section 1254(1).

STATUTORY PROVISIONS INVOLVED

United States Constitution, Amendment XIV, Section 1

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

Ohio Constitution Art. XVIII, Section 3

Municipalities shall have authority to exercise all powers of local self-government and to adopt and enforce within their limits such local police, sanitary and other similar regulations, as are not in conflict with general laws.

Ohio Revised Code Chapter 2151

Ohio Rules of Juvenile Procedure

3 Ohio Administrative Code 3701-47-05

(A) The fetus shall be disposed of in a humane manner.

(B) No person shall experiment upon or sell the product of human conception which is aborted. Experiment does not include autopsies pursuant to sections 313.13 and 2108.50 of the Revised Code.

Akron Ordinance No. 160-1978

STATEMENT OF THE CASE

Ordinance No. 160-1978 was enacted by the Akron, Ohio, City Council on February 28, 1978, in order to provide its citizens with the highest standard of health care. The ordinance, which is set forth in the Appendix, amended and supplemented Chapter 1870, entitled "Regulation of Abortions," of the Codified Ordinances of The City of Akron.

In order to promote the health and safety of women seeking abortions, the City Council enacted the ordinance which sets forth a number of requirements relating to the performance of abortions. One of the requirements, here in controversy, is that a woman prior to performance of the abortion give an informed consent after consultation with her physician. Section 1870.06(B) provides that "[i]n order to insure that the consent for an abortion is truly informed consent . . . ," the attending physician must inform every abortion patient of several enumerated factors relating to a woman's condition of pregnancy and to the unborn child.

Section 1870.06(C) requires that the attending physician provide certain information to the woman regarding the risks associated with her pregnancy and the abortion technique to be employed as well as a general description of the medical instructions to be followed subsequent to the abortion. In addition, any other information which in the physician's judgment is relevant to her decision to have an abortion or

carry the pregnancy to term may be given. The testimony at trial by physicians working for local abortion clinics established that the physicians themselves neither personally consult nor counsel patients prior to an abortion. (Joint App. p. 544)[1]. Rather, non-physician counselors provide such services to a woman prior to her abortion. Several physicians testified at trial that proper medical practice required that a physician counsel the woman. (Joint App. pp. 184, 661, 723-724).

Section 1870.07 of the ordinance requires that there be a twenty-four-hour delay between the time a woman signs the consent form required by Section 1870.06 and the abortion procedure. This section is modified by a section which waives the twenty-four-hour delay in the case of a medical emergency which poses an immediate threat and grave risk to the life or physical health of the pregnant woman. The District Court found that this regulation did not unduly burden the woman's decision and that it furthered the important state interest of insuring "that a woman's abortion decision is made after careful consideration of all the facts applicable to her particular situation." 479 F. Supp. at 1204.

Section 1870.05(B) provides that the consent of

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[1]All citations to the record below are to the Joint Appendix filed by counsel for the clinics, Dr. Bliss, the parents, and the City of Akron with the Court of Appeals for the Sixth Circuit.

one of her parents or her legal guardian must be obtained prior to an abortion upon a pregnant girl under the age of fifteen years, or, in the alternative, a court may provide consent where the parent or guardian is unavailable or refuses consent. State law provides the procedure to be followed in such a judicial proceeding.

Plaintiffs alleged jurisdiction in the District Court under the First and Fourteenth Amendments to the United States Constitution, 28 U.S.C. Section 1331, 28 U.S.C. Sections 1343(3) and 1343(4), 42 U.S.C. Section 1983, and 28 U.S.C. Sections 2201 and 2202.

On April 19, 1978, an action challenging the facial validity of Ordinance No. 160-1978 was instituted. The ordinance was to have become effective May 1, 1978, but a preliminary injunction restraining its enforcement was entered on April 27, 1978, by the United States District Court for the Northern District of Ohio, the Honorable Leroy J. Contie, Jr., presiding. A trial on the merits was held September 5-21, 1978. A final decision on the merits was rendered on August 22, 1979, holding Sections 1870.05, 1870.06(B), 1870.09, and 1870.16 of the ordinance unconstitutional and permanently enjoining the enforcement of those provisions.

On appeal, the United States Court of Appeals for the Sixth Circuit affirmed in part and reversed in part the judgment of the District Court. The Court

of Appeals opinion, issued June 12, 1981, held Sections 1870.05(B), 1870.06(B), 1870.06(C), 1870.07, and 1870.16 unconstitutional (the District Court's finding that Section 1870.09 was unconstitutional was not appealed).

The Court of Appeals denied motions for rehearing timely filed by the parties, and this petition for writ of certiorari followed.

REASONS FOR GRANTING THE WRIT

I. THE RULING BELOW CONFLICTS WITH THE DUE PROCESS STANDARD APPLIED BY THIS COURT IN DETERMINING THE CONSTITUTIONALITY OF ABORTION REGULATIONS IN THAT THE APPELLATE COURT (A) FAILED TO DETERMINE WHETHER THE REGULATION WAS "UNDULY BURDENSOME," AND (B) PROHIBITED ALL DIRECT FIRST-TRIMESTER REGULATION.

A. The Appellate Court failed to determine whether the regulation was "unduly burdensome."

Following this Court's decision of Roe v. Wade, 410 U.S. 113, 163 (1973), in which it was stated that the "state's important and legitimate interest in the health of the mother" became compelling at the end of the first trimester of pregnancy, both State and District Courts have periodically held any regulation of first-trimester abortions to be impermissible.[2]

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[2]As shown by the Court of Appeals holding that "if a regulation resulted in a legally significant impact or consequence on a first-trimester abortion decision, it is invalid." 651 F. 2d at 1204.

Subsequent to Roe v. Wade, however, this Court has made clear that the states have the right to regulate abortions performed during the first three months of pregnancy so long as such regulation does not "unduly burden" a woman's constitutionally-protected right to have an abortion.

This permitted regulation of first-trimester abortions first unfolded in Planned Parenthood of Central Missouri v. Danforth, 428 U.S. 52 (1976), wherein this Court upheld a state statute requiring the informed written consent of a woman, in the first trimester of pregnancy, and requiring certain recordkeeping and reporting by those providing the abortion. In its discussion, this Court noted that:

> [T] he state may not restrict the decision of the patient and her physician regarding abortion during the first stage of pregnancy . . . [However] the imposition by §3(2) of such a requirement (prior written consent) for termination of pregnancy even during the first stage, in our view, is not in itself an unconstitutional requirement. (Emphasis added) 428 U.S. at 66-7.

Thus not all regulation of first-trimester abortions impermissibly interferes with a woman's protected decision to have an abortion, and the questioned regulation need not always serve a compelling state interest in order to be constitutional. This is shown by this Court's statement in Danforth that the record-keeping requirement:

. . . if not abused or overdone, can be useful to the state's interest in protecting the health of its female citizens, and may be a resource that is relevant to decisions involving medical experience and judgment. (Emphasis added) 428 U.S. at 81.

It is apparent that a lesser standard of review was utilized by this Court in evaluating the constitutionality of the regulation.

Interpreting the standard to be applied in determining whether or not a regulation was valid, this Court, in Bellotti v. Baird, (Bellotti I), 428 U.S. 132, 147 (1976), noted that in Danforth, it had been:

. . . held that a requirement of written consent on the part of a pregnant adult is not unconstitutional unless it unduly burdens the right to seek an abortion." (Emphasis added.)

The unduly burdensome standard of review enunciated by this Court in Danforth and Bellotti I was said, in Maher v. Roe, 432 U.S. 464, 473 (1977), to balance the woman's interest against the nature of the state's interference in exercising that right. In Maher, the Court noted that:

Whalen [v. Roe, 429 U.S. 589 (1977)], makes clear, the right in Roe v. Wade can be understood only by considering both the woman's interest and the nature of the State's interference with it. 432 U.S. at 473.

Granted, an abortion regulation must not unduly burden a woman's constitutionally-protected right to have an abortion. However, the Court of Appeals refused to even make such an inquiry of the Akron

ordinance. Connecticut v. Menillo, 423 U. S. 9 (1975); Danforth, supra; Bellotti I, supra; Franklin v. Fitzpatrick, 428 U.S. 901 (1976); Maher, supra; Harris v. McRae, 448 U.S. 297 (1980); and H. L. v. Matheson, 450 U.S. ____, 67 L. Ed. 2d 388 (1981).

B. The Court of Appeals erred in prohibiting all direct regulation of first-trimester abortions.

In applying a two-tier analysis to the Akron abortion ordinance, the Court of Appeals incorrectly interpreted prior decisions of this Court, especially in light of the recent decisions of Matheson, supra, and Thone v. Womens Services, P.C., ___U. S.___, 69 L. Ed. 2d 414 (1981), and in effect held all first-trimester regulation to be impermissible.

Initially, the Appellate Court looked to "the nature of the particular regulatory provision," inquiring as to whether or not the regulation had a " 'legally significant impact or consequence' on the right of a pregnant woman, in consultation with a physician, to choose to terminate her pregnancy." Accordingly, if there was no legally significant impact or consequence, no constitutional issue was raised. Where the regulation resulted in a legally significant impact or consequence, the Court further required that the "regulatory provision serve a legitimate and compelling state interest." But, only if a compelling state interest were found would it further inquire as to whether the regulation imposed

an "undue burden" on the abortion decision. 651 F. 2d at 1204.

This "two-step analysis" required by the Court of Appeals also provided that first trimester regulations are per se invalid if they result in a legally significant impact or consequence, holding as a matter of law that the state has no compelling interest during the first trimester. 651 F. 2d at 1204. Such a standard of review goes far beyond the prior decisions of this Court allowing the direct regulation of first-trimester abortions. Menillo, supra; Danforth, supra; Franklin, supra; Matheson, supra; Thone, supra.

Recently, in Matheson, this Court upheld a requirement of prior parental notice where a minor seeks an abortion. The Court recognized that:

> As applied to immature and dependent minors, the statute plainly serves the important considerations of family integrity and protecting adolescents which we identified in Bellotti II . . . The Utah statute is reasonably calculated to protect minors in appellant's class by enhancing the potential for parental consultation concerning a decision that has potentially traumatic and permanent consequences. (Emphasis added). 450 U.S. ___, 67 L. Ed. 2d at 399.

In so holding, this Court apparently did not apply a compelling state interest test. But even if such a test must be met, it is implied that the state has such an interest in this and all other first-trimester abortion regulations which have been held constitutional by this Court.

Of key importance is the fact that the regulation was one imposed on first-trimester abortion decisions and one which resulted in a legally significant impact, and, yet, the regulation was constitutionally permissible. Unquestionably, a statute requiring parental notification of a minor's decision to have an abortion results in a legally significant impact on the minor's constitutionally protected decision. In recognizing the impact such a regulation has, this Court stated:

> That the requirement of notice to parents may inhibit some minors from seeking abortions is not a valid basis to void the statute as applied to appellant and the class properly before us. The Constitution does not compel a state to fine-tune its statutes so as to encourage or facilitate abortions. To the contrary, state action "encouraging childbirth except in the most urgent circumstances" is "rationally related to the legitimate governmental objective of protecting potential life." Harris v. McRae, supra. 448 U.S., at 325.

The regulation, however, is not unconstitutional merely because it has a legally significant impact on the first-trimester abortion decision.

In determining the constitutionality of an abortion regulation, this Court has consistently required only that the regulation not be unduly burdensome. Bellotti v. Baird, (Bellotti II), 443 U.S. 622, 640 (1979), the mere fact that the regulation pertained to the first trimester of pregnancy did not automatically invalidate the provision.

When viewed in this light, the sections of the Akron ordinance here under review are clearly

constitutional as they do not unduly burden the woman's right to seek an abortion. The Court of Appeals' two-tier analysis conflicts with the standard of review thus far enunciated by this Court in that it prohibits all direct regulation of first-trimester abortions on the basis of there being no compelling interest per se during the first trimester. Regulatory provisions applicable to first-trimester abortion decisions are not unconstitutional simply because they have a legally significant impact on a first-trimester abortion decision. Such a test is merely conclusory and no test at all. In effect, the legal significance of a regulation would hinge on whether its impact is "legally significant." As stated by Judge Kennedy in her dissenting opinion:

> . . . the Supreme Court has never suggested the analysis put forth by the majority. It has sometimes suggested that a compelling state interest is necessary to justify any state regulation of abortion during the first trimester, but that language has always been far broader than required by the facts before it. With the exception of the passage in Colautti, supra, and a part of Planned Parenthood, all of the cases since Roe have suggested that the proper standard is simply whether a regulation that does not effectively prohibit abortions is "unduly burdensome" to the decision whether or not to abort. The Court's decisions are all consistent with that standard. 651 F. 2d at 1215.

II. THE RULING BELOW CONFLICTS WITH PRINCIPLES ENUNCIATED IN PRIOR DECISIONS OF THIS COURT AS TO THE FACIAL CONSTITUTIONALITY OF REQUIRING PARENTAL OR JUDICIAL

CONSENT TO AN IMMATURE, UNEMANCIPATED MINOR'S ABORTION.

The Supreme Court first addressed the issue of requiring a parent's consent to a minor's abortion in Danforth, supra, 428 U.S. at 72-75, in which it was held that a blanket requirement that an unmarried girl obtain parental consent to an abortion was unconstitutional as it imposed an absolute veto power over a minor's decision to have an abortion. As the District Court recognized:

> . . . the court (in Danforth) specifically noted, however, that its holding should not be read as a suggestion that all minors have the capability of giving effective consent to the performance of an abortion. 479 F. Supp. at 1201.

The Akron ordinance under consideration, Section 1870.05(B), is directed at minors unable to give an effective consent and in so regulating it does not provide anyone with an "absolute veto." Section 1870.05(B) provides that the consent of one parent or the legal guardian must be obtained prior to an abortion upon a pregnant minor under the age of fifteen years or, in the alternative, a court may provide consent where the parents or guardian are either unavailable or refuse consent. The applicable procedure to be followed in a juvenile judicial proceeding where a minor is seeking court approval of an abortion is provided by state law under Chapter 2151 of the Ohio Revised Code and the Ohio Rules of Juvenile Procedure. As such provisions were not

constitutionally challenged "as applied" to judicial proceedings in which a minor seeks an abortion, and since the District Court made no finding as to their operation and effect, these provisions cannot form the basis for holding that Section 1870.05(B) is unconstitutional.

When faced with a similar regulation requiring parental consent to a minor's abortion, this Court in Bellotti II expounded upon the constitutionality of such provisions, stating that:

> . . . if the state decides to require a pregnant minor to obtain one or both parents' consent to an abortion, it also must provide an alternative procedure [22] whereby authorization for the abortion can be obtained . . . n. 22 . . . we discuss the alternative procedure described in the text in terms of judicial proceedings. We do not suggest, however, that a state choosing to require parental consent could not delegate the alternative procedure to a juvenile court or an administrative agency or officer. Indeed, much can be said for employing procedures and a forum less formal than those associated with a court of general jurisdiction. 443 U.S. at 643.

The Akron ordinance provides such an "alternative procedure" whereby authorization for the abortion can be obtained in accordance with the constitutional requirements enunciated by this Court in Bellotti II. Section 1870.05 does not purport to determine either the nature of the judicial alternative or the procedure to be followed in such cases, as state law provides a mandatory procedure to be followed in juvenile proceedings. The City of

Akron is prohibited under the Ohio Constitution from legislating in areas in which the state has enacted general laws. Ohio Const. Art. XVIII, Section 3. Any attempt by the City to so legislate would be a nullity under Ohio law. Lies v. Cleveland Ry. Co., 101 Ohio St. 162, 128 N.E. 73 (1920). Akron v. Scalera, 135 Ohio St. 65, 19 N.E. 2d 279 (1939). As the statutory provisions governing juvenile judicial proceedings were not constitutionally challenged in these proceedings, the Akron ordinances should properly be reviewed in light of a constitutional judicial alternative.

It is not to be assumed that during the course of the juvenile proceedings the Court will not construe the ordinance in a manner consistent with the constitutional requirement of a determination of the minor's ability to make an informed consent. So construed, the regulation is constitutionally permissible. Unless and until the section is challenged by a minor who claims to be mature or emancipated, a holding that Section 1870.05(B) is unconstitutional is improper and premature. In Bellotti I, supra, and in Matheson, supra, this Court refused to strike down legislation on its face without a state court's determination as to construction and application of the laws in question.

Recently, this Court vacated the decision of the Court of Appeals, in Thone, supra, wherein it had held a parental consultation requirement to be

constitutional. In vacating the Court of Appeal's decision in Thone, this Court remanded for reconsideration in light of the recent decision in Matheson, supra.

The Court recognized that:

As in Bellotti I, supra, "we are concerned with a statute directed toward minors, as to whom there are unquestionably greater risks of inability to give an informed consent." Id., at 147. 450 U.S. ——, 67 L. Ed. 2d 399.

Finally, it must be stressed that the parental consent provision here under consideration applies only to minor girls fourteen years of age and under.

III. THE COURTS BELOW ERRED IN RULING THAT SECTION 1870.06(B), WHICH ENSURES THAT THE CONSENT FOR AN ABORTION IS TRULY INFORMED CONSENT, WAS UNCONSTITUTIONAL.

A. The information required to be provided by the attending physician in accordance with Section 1870.06(B) is accurate and is not unduly burdensome on a pregnant woman's right to an abortion.

Section 1870.06(B) provides that an attending physician must inform a woman prior to an abortion of several enumerated factors, including that she is pregnant, the number of weeks elapsed, information regarding fetal development, possible complications, that abortion is a major surgical procedure, and the availability of agencies to assist her. This requirement is designed to protect the woman and ensure that her consent will be truly informed. Such a

provision strikes a reasonable balance between the woman's right of privacy and the state's interest in maternal health and ensuring the informed consent of the patient. Maher, supra, 432 U.S. at 473. It is important that the woman have this information prior to the abortion.

Contrary to the Respondents' allegations in the courts below, nothing in this section denies the physician flexibility, as Section 1870.06(C) expressly permits the physician to:

> . . . provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

Only with such knowledge as that required by Section 1870.06(B) can the pregnant woman make a truly informed decision.

The District Court made no findings of fact regarding the subsections involved. Its decision was simply based upon its ruling that the state cannot "specify what each patient must be told." 479 F. Supp. 1203. The Court improperly stated that "defendants were unable to prove that some of the matters required to be told a patient as facts by Subsection (B) were true." 479 F. Supp. 1203. However, the burden of proof was the Respondents' as to the untruthfulness of any such facts, which they failed to show. The courts below erred in not upholding Section 1870.06(B) in its entirety.

B. Even if parts of Section 1870.06(b) were unconstitutional, the courts below failed to sever such subsections in accordance with clear legislative intent.

Section 1870.06(B) was struck down in its entirety by the District Court notwithstanding that several subsections were found constitutional. Subsections (1), (2), (6), and (7) are doubtless rationally related to a woman's maternal health and do not unduly burden her decision to have an abortion. Such subsections should have been severed from the subsections found to be unconstitutional.

Subsections (1), (2), (6), and (7) provide respectively that prior to the giving of an informed consent, a woman is to be told by her attending physician (1) that she is pregnant, (2) the number of weeks that have elapsed from the probable time of conception, (3) that there are numerous public and private agencies available to her with birth control information and that, upon request, the physician will give her a list of such agencies and the services available, and (4) that there are numerous public and private agencies which are available to assist her during pregnancy and after the birth of her child if she chooses not to have an abortion and that, upon request, the physician will provide her with a list.

Not only are these requirements not unconstitutional, but they contain information necessary for a patient to make an informed decision. Indeed, it is

hard to dispute a regulation which requires a physician to tell a woman prior to an abortion that she is pregnant and the number of weeks that have elapsed since she conceived. It can, likewise, not be doubted that birth control is relevant information to the woman and that such information bears an important relation to the maternal health of the woman. The final regulation is designed not only to encourage childbirth, but also to insure that the woman makes a truly informed decision, and as such, is valid. Matheson, supra. In upholding a state's preference for childbirth, in Maher, supra, this Court stated:

> We think it abundantly clear that a state is not required to show a compelling interest for its policy choice to favor normal childbirth . . . .

An informational requirement, such as that contained in the Akron ordinance, was recently approved in a footnote by this Court in Matheson. The statute under review in that case provided that no abortion could be performed

> . . . unless a "voluntary and written consent" is first obtained by the attending physician from the patient. In order for such a consent to be 'voluntary and informed' the patient must be advised at a minimum about available adoption services, about fetal development, and about foreseeable complications and risks of an abortion." 450 U.S. ____, 67 L. Ed. 2d at 393.

Following the decision in Matheson, this Court

vacated an order, in Thone, supra, which had invalidated a detailed informed consent provision in the Nebraska statute.

Regarding a woman's informed consent, this Court has frequently recognized that:

> The decision to abort, indeed, is an important, and often a stressful one, and it is desirable and imperative that it be made with full knowledge of its nature and consequences. Danforth, supra, 428 U.S. at 67; see also, Franklin v. Fitzpatrick, 428 U.S. 901 (1976); Bellotti I, supra; and Maher, supra.

This Court approved an informed consent provision in Franklin v. Fitzpatrick, supra, which affirmed the three-judge District Court's decision in Planned Parenthood Association v. Fitzpatrick, 401 F. Supp. 554 (1975). The District Court, in upholding the provision, noted that:

> In that event, while telling a patient that the law requires such advice, the Act does not foreclose the physician from putting this statement in perspective for a given patient by reassurances, or by comparing the risks of other options. Proper counseling, it would appear, could incorporate the information demanded by the state and tailor the comprehensive advice to the individual case. 401 F. Supp. at 588.

In keeping with the concern expressed for the patient's informed consent in Danforth, the District Court, in Margaret S. v. Edwards, 488 F. Supp. 181 (E.D. La., 1980), severed unconstitutional sections from constitutional sections of an informed consent requirement. The District Court upheld a regulation requiring that a woman be informed that she is

pregnant; the number of weeks elapsed; the particular risks associated with her pregnancy and the abortion technique to be employed; medical instructions to be followed subsequent to the abortion to insure safe recovery; information as to public and private agencies available and the location of public mental health agencies for post-partum psychological damage.

Similarly, in the case of Women's Community Health Center v. Cohen, 477 F. Supp. 542 (D. Me. 1979), the District Court refused to preliminarily enjoin a statute similar to the Akron ordinance, except for a fetal information requirement, holding that the plaintiffs had failed to show a sufficient likelihood that the consent requirement unduly burdens a woman's abortion decision.

Out of the seven subsections of Section 1870.06(B), four are clearly constitutional and should have been severed from those held unconstitutional. The district court quite liberally applied the severability clause, Section 1870.19, to numerous sections, even severing words and phrases out of sentences, and yet refused to apply severability to Section 1870.06(B) which could have been severed quite easily in accordance with the intent of the framers of Chapter 1870. In failing to sever the subsections, the courts below ignored the clear legislative intent as expressed in Section 1870.19.

The test to determine severability as stated by

the District Court in Wynn v. Scott, 449 F. Supp. 1302, (N.D. Ill. 1978), is: (1) are the sections so intertwined that structurally and logically a constitutional defect in one will taint the remainder; (2) what is the will of the legislature; (3) is the statute a product of impermissible state purpose; that is, does every section, in fact, discourage and frustrate the abortion decision; and (4) is it possible to predict what the legislature would do if part of the act were held unconstitutional?

The subsections are not so intertwined that any defects in subsections 3, 4, and 5 taint the remainder. If severed, 1870.06(B) will be completely comprehensible and will clearly inform a physician of what must be told a woman prior to obtaining her informed consent. The informational requirement aids the patient in making a truly informed decision.

The severability of a section, as enunciated by this Court in Buckley v. Valeo, 424 U.S. 1, 108 (1976) was stated as follows:

> Unless it is evident that the legislature would not have enacted those provisions which are within its power, independently of that which is not, the invalid part may be dropped if what is left is fully operative as a law. Champlin Refining Co. v. Corporation Commission, 286 U.S. 210 (1932).

The lower courts found that the unconstitutional sections did not require that the entire ordinance be struck down. 651 F. 2d at 1200. This finding should be applied to the severability of

Section 1870.06(B) and its subsections which, if severed, would require the attending physician to communicate the information in subsections 1, 2, 6, and 7 to the patient. Such a requirement is not unconstitutional. The courts below have failed to effectuate the express legislative intent of the City Council by severing the unconstitutional sections of 1870.06(B).

IV. THE COURT OF APPEALS FAILED TO RECOGNIZE THE STATE'S LEGITIMATE INTEREST IN PROTECTING THE WOMAN'S HEALTH BY REQUIRING PHYSICIAN-PATIENT COUNSELING PRIOR TO THE PERFORMANCE OF AN ABORTION.

In order to protect the health and safety of women seeking abortions, the City Council, in Section 1870.06(C), requires that the attending physician inform the pregnant woman:

> . . . of the particular risks associated with her own pregnancy and the abortion technique to be employed, including providing her with at least a general description of the medical instructions to be followed subsequent to the abortion in order to insure her safe recovery; and shall in addition provide her with such other information which in his own medical judgment is relevant to her decision as to whether to have an abortion or carry her pregnancy to term.

In reversing the District Court's finding that this section was constitutional, the Court of Appeals stated that "Section 1870.06(C) impinges on the medical judgment of the attending physician . . ." 651 F. 2d at 1207. No finding, however, was made that the section interfered with the woman's right to

decide to have an abortion. The core of the constitutional protection recognized in Roe v. Wade, supra, is the woman's right to have an abortion in consultation with her physician. This constitutional protection does not guarantee "a physician freedom to practice medicine free of state regulation." 479 F. Supp. at 1198. The privacy of Roe v. Wade is not simply a right of personal privacy or a "right to your own body," but the privacy of the relationship between the woman and her physician, just like the privacy of the marital relationship in Griswold v. Connecticut, 381 U.S. 479 (1965).

Section 1870.06(C) was enacted to ensure that the consultation protected in Roe v. Wade actually take place. As stated previously, it is the current practice of Akron abortion clinics not to provide such consultation between physician and patient. 479 F. Supp. at 1204. The necessity for consultation prior to the abortion, however, was undisputed. This section does not interfere with the woman's fundamental right to decide whether to terminate her pregnancy. Rather, it ensures the participation of the attending physician in a vital decision.

The physician-patient relationship is an essential component of the woman's constitutional right to decide to have an abortion, as made clear by the decisions of this Court. Most notably, in Connecticut v. Menillo, 423 U.S. 9 (1975), this Court upheld criminal sanctions imposed against violators

of a state statute which prohibited anyone other than a physician from performing an abortion.

In upholding a provision similar to that contained in the Akron ordinance, the District Court, in Planned Parenthood v. Ashcroft, 483 F. Supp. 679 (W.D. Mo. 1980), r'vsd on other grounds, Nos. 80-1130 and 80-1530 (8th Cir. July 8, 1981), stated that:

> The Supreme Court has emphasized the participation and responsibility of the woman's physician regarding the decision to have an abortion and has noted the legitimacy of the state's interest that she make the decision with full knowledge of its nature and consequences. Planned Parenthood v. Danforth, supra. A requirement that the attending physician personally provide information regarding the abortion decision furthers that interest and is not unconstitutional. Planned Parenthood v. Ashcroft, supra at 28.

The giving of the information contained in Section 1870.06(C) "enhances, rather than restricts, the woman's freedom of choice." (Dissenting opinion), 651 F. 2d 1217. Such information does not confine the physician's discretion, but simply reiterates his common law and ethical duty. This court has repeatedly recognized the importance of the physician-patient relationship to the abortion decision. Roe v. Wade, supra, 410 U.S. at 163, 164; Danforth, supra, 428 U.S. at 61; Bellotti II, supra, 443 U.S. at 641 n. 21, 643. In Colautti v. Franklin, 439 U.S. 379, 387 (1979), this court observed that:

> Roe stressed repeatedly the central role of the physician, both in consulting with the woman about

whether or not to have an abortion, and in determining how any abortion was to be carried out.

Most recently, this Court, in Thone, supra, vacated the Court of Appeals order invalidating a detailed informed consent provision in the Nebraska statute applicable to first-trimester pregnancies and remanded for further consideration in light of Matheson, supra.

In holding Section 1870.06(C) to be constitutional the District Court recognized that by requiring the attending physician to provide such information, the effectuation of the abortion decision was thereby made more expensive. Such an impact, however, did not invalidate the provision. A reasonable balance was struck between the state's interest in the health of its female citizens and the woman's rights. The District Court stated:

> That impact is not so great as to require a compelling state interest to support the requirement that the "counseling" be done by the physician rather than by another individual. Akron's City Council could well have rationally concluded that because of the special relationship between a patient and her physician, such "counseling" should be done by the physician. In so doing, it would be furthering a valid state interest in the health of its female citizens. 479 F. Supp. at 1204.

Section 1870.06(C) of the Akron ordinance does not impermissibly interfere with the physician-patient relationship which is so fundamental to the constitutionally protected right to decide to have an abortion. Rather, it furthers a valid state interest in

the health of its female citizens and assures that the woman's consent will be truly informed.

V. THE COURT OF APPEALS FAILED TO RECOGNIZE THE STATE'S LEGITIMATE INTEREST IN PROTECTING THE WOMAN'S HEALTH BY REQUIRING A TWENTY-FOUR-HOUR WAITING PERIOD BETWEEN THE SIGNING OF AN INFORMED-CONSENT FORM AND THE PERFORMANCE OF AN ABORTION.

The imposition of a twenty-four-hour delay between the time a woman signs the informed-consent form and the abortion procedure was found by the District Court not to be unduly burdensome on the woman's decision to have an abortion. 479 F. Supp. at 1204. In reaching this decision, the District Court held that Section 1870.07 furthered the important state interest of insuring "that a woman's abortion decision is made after careful consideration of all the facts applicable to her particular situation." 479 F. Supp. 1204.

On appeal, the District Court's holding was reversed. The Court of Appeals stated that "since Section 1870.07 causes a legally significant impact or consequence on the abortion decision, it cannot be applied to first-trimester abortions." 651 F.2d at 1208. The Court of Appeals, thus, invalidated this section only because it impacted on decisions to have

an abortion during the first three months of pregnancy. The proper standard of review, as discussed earlier, requires that in considering the regulation the focus be placed on the burden imposed on the woman's decision to have an abortion. Danforth, supra; Bellotti I, and Matheson, supra.

A parental notification requirement was upheld by this Court in Matheson, even though it resulted in a legally significant impact on the minor's constitutionally protected decision to have an abortion during the first trimester of pregnancy. In so holding, this Court recognized "that the requirement of notice to parents may inhibit some minors from seeking abortions." The Court, however, stated that this was not "a valid basis to void the statute," 450 U.S. ____, 67 L. Ed. 2d at 400.

Following the decision in Matheson, this Court vacated the judgment of the Eighth Circuit Court of Appeals in Thone, supra, wherein a forty-eight-hour waiting period had been held unconstitutional. In vacating the judgment, this Court remanded the case to the Court of Appeals for reconsideration in light of its decision in Matheson. It is apparent that a first-trimester regulation is not automatically invalid.

It is important to note that the twenty-four-hour waiting period requirement is inapplicable in the case of a medical emergency which poses an

immediate and grave risk to the life and physical health of the pregnant woman under Section 1870.12. The medical expert testifying for the clinics testified that the waiting period would not create a significant risk to the patient's physical health. (Joint App. p. 82, 94, and 118). The section is thus drawn so as not to impose an undue burden on the patient.

By delaying the effectuation of the abortion decision, a reasonable balance is struck between the state's important interest of ensuring careful consideration of that decision by the woman and the woman's right to decide to have an abortion. The District Court, in accordance with the standard of review enunciated by this Court, found that the regulation did not unduly burden the woman's constitutional rights. In reversing the District Court, the Court of Appeals applied an overly stringent standard of review to the regulation which conflicts with the standard enunciated by this Court. Danforth, supra; Bellotti I, supra; and Matheson, supra.

VI. THE TERM "HUMANE" AS USED IN SECTION 1870.16 IS NOT UNCONSTITUTIONALLY VAGUE, AND EVEN IF IT WERE, IT SHOULD HAVE BEEN SEVERED FROM THE BALANCE OF THE SECTION IN ACCORDANCE WITH THE LEGISLATIVE INTENT.

The courts below found Section 1870.16 to be

unconstitutionally void for vagueness. This was due to the fact that the section which deals with the disposal of the remains required that it be done in a humane and sanitary manner. The District Court found that the word "humane" was void for vagueness. The overall intent of the section is, as was noted in Planned Parenthood Assn. v. Fitzpatrick, 401 F. Supp. 554, 573 (1975), aff'd Franklin v. Fitzpatrick, 428 U.S. 901 (1976), "to preclude the mindless dumping of aborted fetuses on garbage piles." In Fitzpatrick, the three-judge District Court upheld a regulation which provided that the Department of Health make regulations for the humane disposal of remains.

The language used in this section was largely taken from a state regulation which provides that "the fetus shall be disposed of in a humane manner." 3 Ohio Administrative Code 3701-47-05 1979. In light of the intent of Section 1870.16, it is clearly not void for vagueness.

Even if the term "humane" were found to be void for vagueness, the entire section should not have been struck down. By severing the term "humane" and allowing the balance to remain, the District Court would have insured two goals: (1) that potential criminal liability could not be founded on an ordinance which local abortion clinics might have difficulty construing and (2) that the health and safety of the Akron community would be furthered by

providing for the sanitary disposal of the fetus. It can hardly be doubted that the health of the community would be furthered by such a requirement and that such a regulation is reasonably within Akron's power. Planned Parenthood Assn. v. Fitzpatrick, 401 F. Supp. 554 (1975).

In addition, by so severing the section the courts below would have been following the manifest intent of the City Council which had provided in Section 1870.19 that a finding of unconstitutionality of one provision was not to result in the striking of the entire ordinance. Champlin, Supra.

CONCLUSION

For these reasons, a writ of certiorari should issue to review the judgment and opinion of the Sixth Circuit.

Dated October 16, 1981.

Respectfully submitted,

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